United Nations AT/DEC/1120

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1120

Case No. 1231: KAMOUN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas on 23 July 1996, 5 March 1998 and 25 March 1999 Mr. M'Hamed Ali Kamoun, former staff member of the United Nations filed three applications requesting the Tribunal to rescind the decision to suspend him and constrain him to take forced leave; to reinstate him in the post and functions he formerly occupied; and to award damages in reparation for the renewed and persistent psychologically and professionally damaging circumstances.

Whereas on 29 July 1999, the Tribunal pronounced Judgement No. 925 in the three *Kamoun* cases and concluded as follows:

> "... important material and moral damage was inflicted on the Applicant. His career was abruptly interrupted. The efforts made by the Administration to provide the Applicant with a position in accordance with his qualifications and consonant with his health and family conditions were, at best, perfunctory. He was offered positions that he could not accept and his refusals to accept them were supported in each case by the Health Department. The Tribunal does not consider that these offers were made in good faith.
>
> Furthermore, the anguish of being left without any functions to perform, for a prolonged period of time, while even his offer of gratuitous work for the Organisation was not accepted, constitutes a moral damage that must be compensated ...

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For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to one year of the Applicant's net base salary at the rate in effect on the date of separation."

Whereas on 18 January, 7 May and 17 August 2001 the Applicant filed further Applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 5 November 2001, the Applicant, after making the necessary corrections, filed a further Application, the pleas of which read as follows:

"B. Pleas

May it please the Tribunal to order or take the following measures and/or decisions:

(a) As a preliminary or provisional measure would it summon and examine the two investigators of the Office of Internal Oversight Services (OIOS) ...

(b) On the substance may it please the Tribunal to rescind the Secretary-General's decision of 29 June 1999 ...

and consequently ... rescind the decision of 13 August 1999 denying the [request] for direct submission of the dispute to the Tribunal ... and render the second report [of the Joint Appeals Board] of 28 December 1998 null and void ...

(c) May it please the Tribunal to order the Administration to honour its obligations specifically and effectively ...

(d) Law and past precedent cite the right to "fair and equitable compensation". ...

..."

Whereas at the Respondent's request, the President of the Tribunal extended to 31 March 2002 and then to 31 August 2002 the time limit for filing the Respondent's answer;

Whereas the Respondent filed his answer on 19 August 2002;

Whereas on 23 June 2003 and 26 June 2003, the Applicant submitted additional documents;

Whereas on 4 July 2003, the Tribunal decided that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

On 3 June 1999, the Administration sent the Applicant a personnel action form (P.35) informing him that he would be terminated on 1 July 1999 without being reinstated in the Information Service.

In a letter dated 21 June 1999, the Applicant asked the Secretary-General to suspend action on that decision. The Joint Appeals Board adopted its report on 29 June 1999. The Panel recommended to the Secretary-General that the Applicant be reinstated for a token one-day period so he could collect his belongings before separating from service upon retirement.

On 29 June 1999, the officer-in-charge of the Department of Management informed the Applicant that the Secretary-General had decided not to grant his request for suspension of action on the decision because it was not an administrative decision in the sense of Regulation 11.1 of the Staff Regulations and therefore the Board was not validly seized of it and because he did not agree with the Board that the definition of irreparable damage, for the purposes of a request for suspension of action, included moral damage.

On 30 June 1999, the Applicant separated from the Organization.

On 29 July 1999, the Tribunal pronounced Judgement No. 925.

On 3 August 1999, the Applicant filed an appeal against the implications and effects of the personnel action form (P.35) of 3 June 1999 and, on 27 August, he brought the matter to the Joint Appeals Board.

On 28 December 1999, the Joint Appeals Board adopted its report. Its considerations and recommendations were as follows:

"*Considerations*

39. Since Respondent did not touch upon the substance and simply argued that the appeal was inadmissible the Panel confined itself to that aspect.

...

43. The facts having been clearly established, the Panel turned to the issue of law, namely whether the termination of a staff member who has reached the statutory retirement age constitutes an administrative decision in the meaning of Staff regulation 11.1 ...

...

45. The Panel's considerations on the admissibility of the present appeal are as follows.

46. First and foremost, the Panel considered whether or not the content of personnel action form P.35 of 3 June 1999 was in the nature of a decision. ...

47. ... the Panel noted that personnel action form P.35 of 3 June 1999 takes note of a fact (the staff member concerned would turn 60 on 15 June 1999) and the law (the General Assembly has set a mandatory retirement age of 60 for staff members appointed prior to 1 January 1990). Its content is therefore purely declaratory. ... The separation of a staff member who has attained the statutory retirement age is a natural fact of which the Administration is simply taking note.

...

52. Personnel action form P.35, in the circumstances of the present case, therefore cannot be considered an administrative decision, the prerequisite for the Joint Appeals Board to be able to consider an appeal filed by a staff member.

53. Secondly, the Panel noted other grounds for the Joint Appeals Board's incompetence to consider the appeal, based on the principle of *res judicata*.

54. The Panel noted that, by challenging his being terminated *directly after being on special leave with full pay* (emphasis is the Panel's), the Applicant was in effect seeking to obtain compensation for the moral damage caused by being placed on special leave, which compensation he assessed as 'reinstatement for at least a token one-day period'.

55. Yet in its Judgement No. 925, *Kamoun* (29 July 1999) the Tribunal had already ruled on the matter of Applicant being placed on special leave and had set the appropriate compensation for the damage suffered, calculated at the date of his cessation of service. ...

56. The Application is therefore contrary to the principle of *res judicata*, which principle the Tribunal recognizes ...

...

Conclusion

58. ... the Panel concludes that this appeal is inadmissible and declares itself not competent to consider it."

On 14 March 2000, the officer-in-charge of the Department of Management transmitted the report to the Applicant and informed him that the Secretary-General had accepted the Board's findings and its unanimous conclusion that the appeal was inadmissible.

On 5 November 2001, the Applicant filed the Application mentioned above.

Whereas the Applicant's principal contentions are as follows:

1. The Applicant claims that being terminated directly from a situation of relegation to special leave with full pay (without even a token one-day period of reinstatement, notwithstanding the favourable opinion of the Joint Appeals Board) is tantamount to a veiled sanction.

2. The Applicant also claims that the P.35 is in violation of the principle of compensation which calls, at the very least for a return to the *statu quo ante*, not to mention the right to rehabilitation, reparation and compensation for moral and material damage in order to erase the effects of the injury done.

3. The P.35 has all the characteristics of an administrative decision based on the definition given by the members of the Joint Inspection Unit in a recent report on the administration of justice.

4. The Applicant points out that pursuant to Staff regulation 9.1 and Staff rule 109.10, individuals may be retained beyond the normal retirement age by decision of the Secretary-General. He also draws attention in this regard to administrative instruction ST/AI/213 on retention in service and employment beyond age of retirement.

Whereas the Respondent's main contentions are as follows:

1. The Respondent maintains that personnel action form P.35 of 3 June 1999 informing the Applicant of his separation effective 30 June 1999 due to his having reached retirement age, pursuant to Staff regulation 9.5 is not an administrative decision that violates the Applicant's conditions of employment and that can be appealed to the Tribunal.

2. The Respondent also maintains that pursuant to the principle of *res judicata*, the Applicant cannot sue the Administration for further compensation for facts which have already been dealt with in Administrative Tribunal Judgement No. 925.

The Tribunal, having deliberated from 4 to 24 July 2003, now pronounces the following judgement:

I. The case concerns a decision of 3 June 1999 whereby the Administration sent the Applicant a personnel action form P.35, notifying him that he would be terminated effective 1 July 1999. The Applicant began by filing an appeal with the Joint Appeals Board requesting suspension of action on the decision and a token one-day period of reinstatement prior to retirement. Although the Board agreed to that request on 29 June 1999, the Secretary-General rejected it on the grounds that he was against the idea of compensation for moral damage. The Applicant then filed an appeal against his termination, again with the Joint Appeals Board. The Board completed its report on 28 December 1999, but did not rule on the substance as it considered the appeal inadmissible on two grounds. First, it said that termination of a staff member who has reached the statutory retirement age is a natural event of which the Administration was simply and quite rightly taking note. It then cited another reason why it was not competent to consider the case, namely the principle of *res judicata*.

II. The Applicant asked the Tribunal to consider the P.35 personnel action form as an administrative decision which had caused him injury. In effect he claimed that being terminated directly from a situation of relegation to special leave with full pay (without at the very least a token one-day period of reinstatement, notwithstanding the favourable opinion of the Joint Appeals Board) was tantamount to a veiled sanction. He also claimed that the P.35 form had been transmitted to him in violation of the principle of compensation which calls for at least a return to the *statu quo ante*, not to mention the right to reparation and compensation for the moral and material damage, to erase the effects of the injury done.

III. By way of defence, the Respondent maintained that, according to the principle of *res judicata*, the Applicant could not sue the Administration for further compensation for events that had already been dealt with in Judgement No. 925 of 29 July 1999.

In this case the Tribunal concluded as follows:

> "... important material and moral damage was inflicted on the Applicant. His career was abruptly interrupted. The efforts made by the Administration to provide the Applicant with a position in accordance with his qualifications and consonant with his health and family conditions were, at best, perfunctory. He was offered positions that he could not accept and his refusals to accept them

were supported in each case by the Health Department. The Tribunal does not consider that these offers were made in good faith.

Furthermore, the anguish of being left without any functions to perform, for a prolonged period of time, while even his offer of gratuitous work for the Organisation was not accepted, constitutes a moral damage that must be compensated (cf. Judgement No. 812, *Everett* (1997))."

The Tribunal awarded the Applicant an amount equivalent to one year of base salary by way of compensation for the damage.

IV. In considering the Applicant's claims, the Tribunal notes that the Applicant is asking the Tribunal to evaluate the legal consequences of the personnel action form of 3 June 1999. The Joint Appeals Board made a pronouncement on that application, judging that personnel action form P.35 merely took note of a fait accompli and was not an administrative decision that could be appealed to the Tribunal. The Tribunal considers that by asking it to recharacterize the personnel action form (P.35) as a decision that is appealable — which, in fact it is — the Applicant is, in fact, hoping that Judgement No. 925 of 29 July 1999 will be revised.

V. In order to assess the Applicant's request, the Tribunal will rule bearing in mind Rule 12 of the Tribunal's Statute which states that:

"The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

The Tribunal has consistently taken the position in its case law that a judgement can be revised only in very exceptional cases. For example in Judgement No. 672 *Burtis* (1994):

> "The Tribunal finds nothing in the Applicant's request which could justify a revision of the previous decision. The Tribunal finds that the Applicant does not allege any new facts of such a nature as to be a decisive factor warranting a revision of the judgement, under article 12 of the Tribunal's Statute."

In accordance with the Statute and case law, in order to be able to apply for revision of a judgement it is necessary to satisfy certain formal and substantive conditions. As regards formal conditions, article 12 sets a time limit for filing the application. As regards substantive conditions, in order for an application to be admissible the Applicant must on the one hand, plead discovery of a new fact, that is to say one that was not known at the time the judgement was given, and, on the other, the new fact must be of such a nature as to be able to influence the outcome of the dispute as reflected in the judgement.

VI. In the case in point, in order to be able to file the appeal provided for in article 12 the Applicant must meet both these conditions. In order for the request to be admissible the application must be filed within 30 days of the discovery of the fact the Applicant is alleging and within one year of the date of the judgement. In addition, the Applicant must establish that the decisive factor upon which he is basing his application was unknown to him at the time the judgement was given.

VII. The Tribunal notes that the Applicant was aware of the date of his retirement and that personnel action form P.35 was sent to him on 3 June 1999, prior to the Judgement of 29 July 1999 whose revision he is implicitly requesting. This fact is confirmed since in its Judgement No. 925 (1999) the Tribunal mentions the Applicant's retirement:

> "When the circumstances surrounding the decision are not at all clear, as in the present case, the prolongation of leave presented the Applicant with a fait accompli without any escape, especially since he was already close to obligatory retirement and making a mockery of his rights."

The Tribunal finds that one of the conditions for admissibility, namely, a new fact that was not known at the time the judgement was given has therefore not been met. Since both conditions provided for in article 12 must be met and one of those conditions has not been, the Application is consequently inadmissible.

VIII. The Tribunal rejects the Application as a whole.

(Signatures)

Julio **Barboza**
President

Spyridon **Flogaitis**
Member

Brigitte **Stern**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Secretary